



POLICE DEPARTMENT

August 30, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Augusto Rivas
Tax Registry No. 942434
19 Precinct
Disciplinary Case No. 85174/09

The above-named member of the Department appeared before me on August 10, 2010, charged with the following:

1. Said Police Officer Augusto Rivas, while assigned to the 45 Precinct, while off-duty, on or about September 13, 2008, at approximately 2100 hours, inside the premises located at [REDACTED] County, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer engaged in a physical dispute with Ms. [REDACTED], to wit: said Police Officer wrongfully pushed Ms. [REDACTED] which resulted in her falling to the ground.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT PROHIBITED CONDUCT

2. Said Police Officer Augusto Rivas, while assigned to the 45 Precinct, while off-duty, on or about September 13, 2008, at approximately 2100 hours, inside the premises located at [REDACTED] County, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer failed to provide the number of a witness to the incident to members of the Department who responded to a 911 call at that residence, to wit: said Police Officer told Lieutenant Michael Sullivan that he did not have a telephone number for his mother, when in fact that was not true.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

The Department was represented by Katie O'Connor, Esq., Department Advocate's Office, and the Respondent was represented by Craig Hayes, Esq.

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The Respondent, through his counsel, entered a plea of Not Guilty to Specification No. 1 and Guilty to Specification No. 2. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty of Specification No. 1. The Respondent, having pleaded Guilty, is found Guilty of Specification No. 2.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Robert Olson as its sole witness.

Sergeant Robert Olson

Olson is assigned to the Intelligence Division, where he has been for about three weeks. Prior to that, he was in Bronx Investigations for nine and a half years. On September 13, 2008, he conducted an investigation regarding a domestic incident at [REDACTED], involving the Respondent. He was assisting the duty captain and he responded to the [REDACTED] Precinct.

Olson said he interviewed the first responding officers and Lieutenant Sullivan. He also interviewed the complainant, [REDACTED]. [REDACTED], he said, appeared to be pregnant and he believed she said that she was at the eighth month.

[REDACTED] told him that she had spent the night at the Respondent's apartment and in the morning or in the afternoon, she was trying to speak to the Respondent about her

pregnancy. The Respondent, she told him, was on the computer and not paying attention to her. He was, she told Olson, on the computer with another female. [REDACTED] said she went over and shut the computer off and she said the Respondent became enraged. Olson said it became physical and he grabbed her and pushed her to the ground.

Olson said that [REDACTED] seemed upset. Olson said she told him that she was going to call 911 but she hung up because she was scared. Then, Olson believed she said that she dialed a second time and was forced out of the apartment. Eventually, she said that she called 911 and told the operator that she was a neighbor and heard two people fighting. She did that, she said, because she was scared. She feared that the Respondent would be mad at her. He did not recall her telling him about calling 911 on a previous occasion.

[REDACTED], Olson said, was taken by Sullivan to the [REDACTED] Precinct. Olson conducted his interview after that. He also interviewed the Respondent that night. Olson said that in his official Department interview, the Respondent said that he was on the computer. [REDACTED] turned the computer off which led to a verbal argument. Olson said that the Respondent admitted that it was physical in the sense that she went to the ground but, Olson said, in the Respondent's version she tripped and fell on her own. This, Olson said, was not consistent with what [REDACTED] had said. Olson said that [REDACTED] had said that the Respondent threw her to the ground.

It was determined, Olson said, that a physical domestic incident did occur and that the Respondent was impeding the investigation by not being completely forthcoming with Sullivan. Olson said that the Respondent admitted this at his official Department interview. Olson also said that the Respondent had been evasive, in that initially he told

Sullivan that the argument happened at the door and that she was never inside the apartment. He went on:

That was proven that she was in the apartment the 911 calls were made from inside the apartment by a female and he stated that the only females that were in the apartment at the initial time, I believe, his mother and his cousin that they had left the location but then at the formal interview he had stated that Ms. [REDACTED] was in the apartment during this altercation.

Olson said that [REDACTED] appeared scared. He stated that on the night of the incident she behaved in a manner that was consistent with someone involved in a domestic incident. Olson indicated that he has been an investigator for nine years and "...just her demeanor sometimes the victim / complainant doesn't always say everything up front or may try to mask something because they're scared, they don't want to get the officer in trouble, they are not as forthcoming with the information."

On cross-examination Olson agreed that [REDACTED]'s demeanor could have been caused by something other than fear. After reviewing the transcript he agreed that it was "possible" that [REDACTED] was constantly interrupting the investigators. When asked if there was a point in time when they had to calm her down, Olson responded, "I believe so, yes." He said he could not make a judgment as to whether her demeanor could have been caused by psychological or mental problems. But he acknowledged that she admitted that she suffers from depression. Olson did not recall if [REDACTED] had told them that she had been hospitalized for depression but after reviewing the transcript, he agreed that she had said that.

He again did not recall if she told them that she had tried to commit suicide and again after looking at the transcript to refresh his recollection, he agreed that she had told

them that. He agreed that [REDACTED] also admitted that she had been hospitalized as a result of that. Olson admitted that Bronx Investigations never followed-up with any attempt to get hospital or psychological records. He further acknowledged that they never tried to get a waiver from her.

When asked by counsel if in another part of the interview [REDACTED] had said, "I'm the type of person that I feel like I really need to talk to you and I want you to hear me I will go up to 20 times or I will look for other ways" and if that sounded familiar, Olson responded, "Somewhat yes." He agreed that she admitted that she is very persistent when she wants to talk to someone and they are trying to ignore her.

Olson agreed that during the interview he was not accusing [REDACTED] of anything but that he was trying to be correct and not confrontational. Yet, he indicated that she seemed to be getting excited. He did not consider that this excitement might not be due to fear, but due to issues that she had with depression, suicide and hospitalizations.

When asked if he had to determine the credibility of witnesses that night, Olson replied:

Well, I had the statement of Police Officer Rivas that there was a physical altercation, both of them admitting it was just having a difference in opinion of how she ended up on the ground. Neither one of them never said it didn't happen. Both of them said she ended up on the ground just their versions Police Officer Rivas' failure to cooperate with the investigation by misleading Lieutenant Sullivan during the preliminary investigation when they first arrived on the scene also led to his being discredited, his version of events because he admittedly deceived the lieutenant during the preliminary investigation.

In assessing [REDACTED]'s credibility, Olson was asked if he would take into consideration that someone tried to commit suicide. Olson responded: "In my final

determination it is going to play a factor but there are other things that I am going to use to also determine that.” When asked if he would consider the fact that someone lied to the police in the past, he said that it would be considered. Olson acknowledged that [REDACTED] told them during her interview that she had lied to the police.

Olson said that [REDACTED] had lied when she called 911 and said that she was a neighbor. Olson added that she did that because she was scared and he said that was consistent with other investigations he had done, where the complainants try to distance themselves because they do not want the officer to know they called.

He was then reminded that she had also lied when she told the police that the Respondent had kicked her and Olson then agreed that she had lied twice to the police. After some questioning, Olson also agreed that if she said something had happened that did not happen, then that was a lie. He also agreed that would be a factor in determining credibility.

Olson then stated: “Lying is always significant but not exactly if her lying was based on her being nervous and scared and you know, that affected what she had said.” When asked, in effect, if everything that adversely affected her credibility could be explained by her being scared, Olson said, “I’m saying it’s possible that there is other reasons but there is a possibility that yes she was scared of him.” When asked if it was also possible that she lied to hurt him on the job, Olson agreed that it was possible.

Olson did not recall, in his eight and a half or nine years in Inspections, ever coming across a case where a spouse lied to get a member of the service in trouble but he agreed it was possible.

Olson said that [REDACTED] had told him that the push occurred near the bathroom.

Olson agreed that [REDACTED] stated that the Respondent was going into the bathroom to get away from her and she was going into the bathroom also.

Olson said that she was trying to engage him in this discussion and he was walking around. She kept trying to follow him because he did not want to talk to her. Olson said that she said that at the bathroom door he grabbed her and pushed her to the ground. Olson did not recall if she said he was walking into or out of the bathroom but Olson agreed that the Respondent was trying to get away from her.

Reading from the transcript, counsel for the Respondent asked if the following refreshed his recollection: "Ms. [REDACTED]: He was going to the bathroom. Ms. [REDACTED]: I tried talking to him and he was like locking the door, please listen, can you please talk to me." Olson agreed that reading the transcript did refresh his recollection. Olson also agreed, that the Respondent said that he was in fact going to the bathroom in order to get away from [REDACTED]. He also agreed that [REDACTED] said that she is very persistent and she would go after someone until they listened. Olson also agreed that [REDACTED] was saying that she was trying to get into the bathroom and the Respondent was trying to lock the door in order to get away from her and that is when she fell down. Olson also agreed that [REDACTED] said that it was not a drastic push.

On re-direct examination, Olson noted that [REDACTED]'s attempt at suicide occurred when she was very young. Olson said that he found [REDACTED] to be credible. One of the factors he used was that the Respondent had admitted that he lied to Sullivan. He said that it was very common to have to calm a complainant or victim down during an interview.

On re-cross examination, Olson said the lie that the Respondent told about not

having his mother's phone number was not the only lie that he told to Sullivan. Olson agreed that one of the reasons he found [REDACTED] credible was that the Respondent had lied.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent has been a member of the Department for four years. His first assignment was Impact in the 52 Precinct, then the 45 Precinct and then Viper 1. He is currently working in the 19 Precinct.

On September 13, 2008, the Respondent was living at his mother's house at [REDACTED]. [REDACTED] is his ex-girlfriend. He had been with her for about six years and he had lived with her for about four years. They had broken up two months earlier. She had called him that day saying she was depressed and feeling lonely. Knowing her psychiatric history and her suicidal thoughts, he thought it would be okay for her to come over. The Respondent advised her that he was on the computer and that he was talking to someone and if that was not going to be a problem for her, she could come over.

She came over while his mother was still there and there was no problem at that time. His mother and his mother's friend left and they were all alone in the apartment. She started to ask about his relationships and how long he knew the girl he was chatting with on the computer.

He was trying to avoid the conversation because he "knew how she gets" but she

kept insisting and getting agitated. She then turned off the computer. He was afraid that she was going to get physical, so he got up and started to walk away from her. The Respondent stated that she started swinging at him and so he held his arms up to avoid being hit in the face. Trying to avoid a confrontation, the only thing he could think of was separating himself from her. He said he ran into the bathroom with the intention of locking himself inside.

The Respondent said that she appeared to be out of control. He said that she was asking him to talk to her but given her behavior, he did not think there could be a conversation. She was screaming and he felt that she did not want to talk but that she wanted to argue.

As soon as she turned off the computer, he got up and he thought of the bathroom as a way to get away from her. He went into the bathroom but she followed him. When he was inside the bathroom he tried to close the door but she was pushing on it. He noted that the bathroom door opens inward. He said that she was using her body weight to get into the bathroom. He knew, he said, that he could not let her inside because that would lead to an escalation of things. The only thing that he could think of was to push her away from the door, not hard enough to hurt her but so he could close the door. It was not, he said, his intention to hurt her. When he pushed her, she slipped and fell. He saw that she got up and she was fine, so he closed the bathroom door.

The Respondent acknowledged that he asked her to leave the apartment as soon as he noticed that she was starting a confrontation. She did not leave.

When he pushed her it was somewhere in the chest and he did not, he claimed, push her hard. He did it so that he would not find himself in a position where he would

have to defend himself against her. He believed that if the dispute had gone on it would have become physical. He said that [REDACTED] fell on her butt in a seated position. She did not hit her head when she fell and she got up "just fine." When he saw that she was okay, that is when he closed and locked the door.

It was never his intention to knock her to the ground. His only intention was to avoid a physical argument. He stayed inside the bathroom for five or ten minutes and when he noticed that things were "cooler" he came out. He saw her packing her things and he remembers her telling him that she was going to make his life miserable. She said if he did not care about her, she was never going to care about him and she was going to make him pay. The Respondent said she left with a smirk on her face.

Members of the service, including Lieutenant Sullivan, came to his apartment that night. The Respondent acknowledged pleading guilty to lying to Sullivan about not having his mother's phone number. He said that he did not know it by heart but it was on his phone. The Respondent said that his mother is very "depressive" and even though he knows what he did was wrong, he did not want to worry his mother who was not present when the argument happened.

On cross-examination the Respondent agreed that [REDACTED] had asked for permission before she came over and he granted it. He said that she was eight months pregnant and he believed the child was his. He agreed that she instigated an argument and that there might have been one or two pushes from her. He said that he took into consideration the fact that she was pregnant and that is why he did not push her hard, only enough to get her away from the door. He agreed that he locked himself in the bathroom.

He also agreed that at some point [REDACTED] left the apartment. She did not leave

while he was in the bathroom because he saw her when he came out. He agreed that at some point he heard a knock at the door and he did not answer. He explained that he thought it was her coming back but in fact it was police officers.

He did not tell Sullivan that his mother's number was programmed in his phone. He explained to Sullivan about his not wanting his mother to be concerned, "after." By that, he meant during the "proper investigation."

FINDINGS AND ANALYSIS

Specification No. 1 alleges that the Respondent "wrongfully pushed Ms. [REDACTED] which resulted in her falling to the ground."

Two people were present when the actions which are at the center of this case had occurred. One was the Respondent; the other was [REDACTED]. [REDACTED] did not testify, but Olson testified about a statement she made to him shortly after the incident. This is, of course, hearsay. One of the problems with hearsay is that there is no opportunity for confrontation. That is, the details of the witness's story cannot be explored or challenged. A second problem is that the re-teller of the story may change details because he or she was not an actual participant or witness in the underlying events. A review of Olson's testimony indicates that both problems manifest themselves in his effort to tell [REDACTED]'s story. Added to that is the fact that Olson stated that he had determined that [REDACTED] was the victim of domestic violence. While Olson's opinion is certainly valuable, it is not evidence in this case and raises the issue of whether his bias colored the way he presented his recollection of the interview and what he said that she said.

Perhaps more significant is that Olson and, to some extent, both attorneys have framed the factual issue as one involving credibility. The Court finds that when one compares what [REDACTED] actually said at the interview, which came into evidence when Olson was cross-examined, with [REDACTED]'s actual words from the transcript of her interview, the facts are not really in dispute and thus credibility is not really an issue.

The Respondent testified that he and [REDACTED] used to go out. At the time of the incident she was about eight months pregnant with his child. These facts are unchallenged. The Respondent testified that they were no longer together but she called and asked to come over. The Respondent said he told her that she could come over. Olson said that [REDACTED] had said she had spent the night there. Either way, she was clearly in the Respondent's apartment.

While [REDACTED] was at his apartment, the Respondent was on his computer chatting with another female. Both [REDACTED] and the Respondent stated this, so it is not in dispute. She became angry. Again, both agree. She followed him around the house demanding that he listen to her. Once again, this is not in dispute. The Respondent said that she was physically attacking him—this only comes from the Respondent.

Both seem to agree, as well, that the Respondent retreated inside the bathroom and tried to close the door with [REDACTED] outside. It was at this juncture that he pushed her and she fell. Again, this does not appear to be in dispute by either side.

The Respondent said he pushed her gently, just enough to get her outside the door. [REDACTED] told Olson that it was not a "drastic" push. Different words, perhaps, but the same substance.

The question then becomes: was this conduct "wrongful," as charged in the

specification?

In addressing this, the first thing that must be examined is injury. No injury is alleged in the specification. There was no testimony about any injury to [REDACTED] from Olson. He did not report seeing any evidence of injury, such as bruising or other marks on [REDACTED] nor did he report hearing her complain of injury. The Respondent was not arrested, which is another indication that there was no injury, particularly since [REDACTED] was cooperative on that night.

The fact that there was no injury is certainly a good thing for both [REDACTED] and the Respondent. But it also indicates that the push was as described—not very hard and certainly not done with intent to harm. A push that caused injury, even if that consequence was unintended, could be wrongful. The push in this case caused no injury. Thus, injury is not a basis upon which to deem the push, in this case, “wrongful.”

That is not the only reason a push could be “wrongful.” It is necessary to explore what preceded the push. As has been noted, both the Respondent and [REDACTED] agree that [REDACTED] was angry and demanding to be heard. She followed him around the apartment. The Respondent said he sought shelter inside the bathroom, so as to avoid any escalation of the confrontation. Even if one leaves out the Respondent’s claim that she was hitting him at that time, this is not an unreasonable act on the Respondent’s part. By isolating himself he would give [REDACTED] a chance to calm down and reduce the possibility of a real physical confrontation. The Respondent described the push as an effort to get her out of the way so that he could close the door, due to the fact that she had followed him to the bathroom.

This Court does not see that as a “wrongful” act. Indeed it was one intended to

calm the confrontation.

There were many other things raised during the brief trial in this matter: [REDACTED]'s allegedly unstable mental health, her alleged fear of the Respondent, his being less than honest when the police arrived (see Specification No. 2), and her being less than honest in claiming and then recanting allegations of a kick that did not occur. None of these are relevant to the simple issue before this Court, i.e., whether the Respondent "wrongfully" pushed [REDACTED]. As noted above, he did not. Consequently, the Respondent is found Not Guilty of Specification No. 1.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined, see *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on July 10, 2006. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

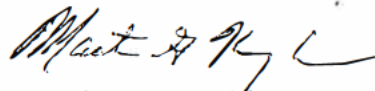
The Respondent was charged under Specification No. 2 with telling Lieutenant Michael Sullivan, an officer responding to incident, that he did not have a telephone number for his mother, when in fact that was not true.¹ The Respondent admitted to this. Withholding information from officers investigating an incident is a serious matter. The closest case this Court could find is Disciplinary Case No. 8443 1/08 signed February 23, 2009. In that case, a four-year member with no prior disciplinary record forfeited 20 vacation days and agreed to cooperate with counseling for becoming involved in a

¹ The specification mentions that she was a witness in this case but there is no evidence that she was present at the time of the incident. The Respondent testified that she left the apartment before the incident between himself and [REDACTED] occurred.

physical and verbal altercation with his girlfriend. On-duty personnel responded to the incident after the Respondent had left. The Respondent neglected to report the incident to the Department. He also interfered with the investigation by falsely claiming that the dispute involved his cousin.

Consequently, this Court recommends that the Respondent forfeit 20 vacation days in this case.

Respectfully submitted,



Martin G. Karopkin
Deputy Commissioner – Trials

APPROVED
DEC 07 2010
RAYMOND W. KELLY
POLICE COMMISSIONER

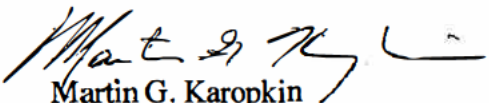


POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER AUGUSTO RIVAS
TAX REGISTRY NO. 942434
DISCIPLINARY CASE NO. 85174/09

The Respondent received an overall rating of 3.0 “Competent” on his most recent annual performance evaluation. [REDACTED]
[REDACTED] Since June 2009, he has been on Level-II Discipline Monitoring. He has no prior formal disciplinary record.

For your consideration.


Martin G. Karopkin
Deputy Commissioner – Trials